RE YUSNITA HUSSAIN, EX P MBF – FINANCE BHD

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[BANKRUPTCY NO: 29-454-1997]
29 APRIL 2000

BANKRUPTCY: *Petition - Validity of creditor's petition - Amount stated did not reflect part payments accepted by creditor from guarantor - Whether petition should reflect reduced amount - Whether petition defective*

This was an appeal by the appellant against the dismissal of her application to set aside the receiving and adjudication orders made against her. Pursuant to a judgment debtor summons ('JDS') action, the respondent obtained an order against the guarantor whereby he was ordered to pay RM300 per month for the adjudged sum until full realisation. The guarantor made two separate payments amounting to RM600. Thereafter, the respondent filed a creditor's petition against the appellant. The issue was whether the debt owing to the respondent at the hearing date of the petition should have been reduced by RM600.

Held:

[1] When a creditor subjects itself to the jurisdiction of the inferior court whereby instalment payments are agreed upon then the latter resigns itself to the jurisdiction of that subordinate court for any remedy, in the event the debtor reneges on the order.

[2] Two previous part payments had been made toward the partial satisfaction of the debt, but not reflected by a reduced debt in the petition. Due to the strict requirements of the Bankruptcy Act ('the Act'), a legal poser would confound the court if the amount in the creditor's petition as supported by the affidavit did not tally with the evidence before the court.

[3] The Act is a piece of legislation which must be given a strict construction approach bearing in mind the penal effect of an adjudicating order on the debtor. The opening words of s. 5 of the Act read as the debt owing by the debtor at the presentation stage and the debt of the petitioning creditor during the hearing day.

[3a] Indisputably the balance debt of the creditor at the hearing date was RM91,129.48 and not RM91,729.48 as stated in the creditor's petition. As the debt owed by the debtor on the presentation date or owing to

the creditor at the hearing date was not as per the amount in the petition it was thus open to scrutiny. Also, as the amount had been reduced by RM600, then invariably too the interest would be reduced proportionately. By merely statement the judgment sum in a mechanical manner and thus depriving the debtor of his rights to know the exact debt, his rights without doubt had been infringed. Such an infringement was also an infringement of the Act.

[4] Regardless of the source of the payment, so long as payments are accepted after the act of bankruptcy has occurred, the creditor runs the risk of having his petition declared defective.

[5] The creditor was hard pressed to admit being owed of the stated sum in the petition, be it during the presentation day or the hearing day (a statutory requirement). By accepting the part payments, the creditor had disentitled itself of presenting the petition, let alone entitled to apply for a receiving order on the hearing day based on the sum stated in the petition. The creditor had failed to establish the debt in the petition on those statutory dates. The defects were certainly not formal but substantive and beyond the help of s. 131 of the Act.

[6] The creditor would be enriched by the RM600 obtained pursuant to the JDS action. Such an enrichment or acquisition would certainly be inequitable in the circumstances of the case. As such, the petition must be dismissed forthwith.

[7] The power to adjudicate a person bankrupt is a discretionary power to be applied only after that receiving order has been made. In the circumstances of the case, the invocation of the court's discretionary power therefore was unjustified as the receiving order hurdle was yet to be overcome.

[Appeal allowed.]

Case(s) referred to:
Foo Loke Ying & Anor v. Television Broadcasts Lyd & Ors [1985] 1 CLJ 511 ***(refd)***
Montgomery & Co v. De Bulmes [1898] 2 QB 420 ***(refd)***
Low Mun v. Chung Khiaw Bank Ltd [1988] 1 MLJ 263 ***(refd)***
OCBC Bank (M) Bhd v. Sethu Ambalagara Thevar [1998] 3 CLJ 563 ***(refd)***
Re A Debtor [1902] 2 KB 260 ***(refd)***
Re A Debtor, 478 of 1908 [1908] 2 KB 684 ***(refd)***
Re A Bankruptcy Notice [1934] 1 Ch 431 ***(refd)***
Re Child, ex p Child [1892] 2 QB 77 ***(refd)***

Re Debtors (No. 20 of 1953), ex p The Debtor v. Scott & Anor [1954] 3 All ER 74 ***(refd)***
Re Fong Yuan Kwong, ex p Public Bank Bhd [1996] 4 MLJ 42 ***(refd)***
Re Gentry [1910] 1 KB 825 ***(refd)***
Re HA Pereira [1932] MLJ 112 ***(refd)***
Re Loh Kok Huah ex p Ban Hin Lee Bank Bhd [1991] 3 CLJ 1817 ***(refd)***
Re Saloma Co [1963] 29 MLJ 46 ***(refd)***
Re MS Ward [1933] MLJ 69 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 4, 5, 6(2)(a), (3), 131
Bankruptcy Rules 1969, r. 117

Other source(s) referred to:
Williams on Bankruptcy, 18 edn, p 67

For the judgment debtor - Zainal Abidin; M/s Zainal & Mariani
For the judgment creditor - Abdullah Hamzah; M/s Wrigglesworth & Co

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:

The respondent creditor alleged that it had obtained within one order, a consent and default judgment of non-appearance against the appellant and her guarantor one Mohd Anizam bin Ahmad respectively on 2 February 1997, for the sum of RM91,729.48. On 31 July 1997 the respondent had issued a bankruptcy notice against the appellant, with it successfully being served on 7 August 1997. On 3 September 1997, pursuant to a judgment debtor summons action the respondent again obtained an order against that Mohd Aznizam bin Ahmad, whereby he was ordered to pay RM300 per month for the adjudged sum until full realisation.

To fully appreciate the matter at hand I shall herewith lay down the subsequent chronology of events for consideration, which is as follows:

i. On 1 November 1997, pursuant to the JDS RM300 was paid to the respondent;

ii. On 13 December 1997, again pursuant to the JDS another RM300 was paid to the respondent;

iii. On 30 December 1997, the creditor's petition was filed against the appellant;

iv. On 16 February 1998, the creditor's petition was alleged to have been served on the appellant;

v. On 23 December 1998, the court pronounced the R & A orders against the appellant;

vi. On 2 December 1999, encl. 12 was filed to set aside the R & A orders;

vii. On 28 March 2000, encl. 12 was dismissed with costs; and

viii. On 4 April 2000, the appeal for the dismissal was filed.

From the above set of facts some conclusions could be drawn *viz.*:

a. a judgment debtor summons action was proceeded with against the guarantor in the lower court despite an order having been obtained at the High Court;

b. that judgment debtor summons action was initiated even though bankruptcy proceedings had already been initiated against the principal borrower on 31 July 1997;

c. payments of RM600 were still accepted prior to the service of the creditor's petition but after the service of the bankruptcy notice; and

d. the amount stated in the creditor's petition was precisely the same as in the final judgment *ie*, RM91,729.38, thus ignoring the combined sum of RM600 paid on two occasions.

Having heard the appeal I allowed it with costs. I now supply my reasons. Without beating around the proverbial bush, had the judgment debtor summons been taken against the appellant and not the guarantor, prior to the filing of the creditor's petition, my task would have been less burdensome, though not insurmountable. This is so as precedents do not take too kindly to bankruptcy proceedings if another course of action has been put in motion to levy execution to recover the judgment sum (*Re HA Pereira* [1932] MLJ 112). As I perceive it, when a creditor subjects itself to the jurisdiction of the inferior court, whereby instalment payments are agreed upon, then the latter resigns itself to the jurisdiction of that subordinate court for any remedy, in the event the debtor reneges on the order. This is so as for all intents and purposes the judgment of the High Court, as in this case, will have undergone a process of modification (*Montgomery & Co v. De Bulmes* [1898] 2 QB 420). I now take the matter a step further. In *Re A Debtor* [1902] 2 KB 260 the creditor had issued a writ of *fi. fa*. pursuant to a judgment recovered against the debtor, whereupon the sheriff subsequently seized certain goods from the debtor. Due to objections and in pursuance of instructions from the creditor's solicitor, the

goods were returned, thus leaving the debt unpaid. With the debt still in existence, the judgment creditor on the same day issued against the debtor a bankruptcy notice for the whole of the judgment debt. The questions posed *inter alia*, was could a bankruptcy notice in the circumstances of the case be issued in respect of the judgment debt. Vaughan Williams LJ at p. 268 said:

> The result is that, in our judgment, the judgment creditor in the present case had a right to serve the bankruptcy notice, for there was no ... *deduction from the judgment debt* mentioned in the bankruptcy notice" (emphasis mine).

With the above words at the back of my mind I now proceed to the bankruptcy notice that was filed on 31 July 1997. Having perused the available facts I have no hesitation in stating that I have no quarrel with its filing at that material time. There was no legal impediment to prevent its filing then as at that date the debt was yet to be reduced by any amount. A different picture unfolded later when new facts were introduced during the hearing of the creditor's petition. Come that date, apart from the JDS action having been pursued, by which act the latter 'waived' (if I may loosely use this word) its right to proceed with a bankruptcy action, the judgment debt had been reduced by two separate part payments. With such a drastic factual change crystallising, the statement of Vaughan Williams J could be distinguished and hence redundant. Much to the chagrin of the appellant, inspite of those factual changes the creditor had still not seen it fit to paint the correct picture by having the judgment sum in the petition modified. The relevancy of this last sentence becomes apparent as I discuss some authorities along the way. In *Re A Debtor*, 478 of 1908 [1908] 2 KB 684, a mistake was committed when the amount of the interest was wrongly calculated, albeit small, resulting in the bankruptcy notice being declared bad. Cozens-Hardy MR at p. 687, touching on the mistake, opined:

> I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him ... It seems to me that a defect of this kind is substantial, that it is not formal ... .

At p. 688 His Lordship further said:

> The Court of Appeal in *In re OCS(3)* explained not for the first time, the extreme importance of great strictness in dealing with bankruptcy notices.

In *In re Child, ex p Child* [1892] 2 QB 77 part payments had been made toward a judgment debt. The question arose as to whether the creditor was entitled to serve a bankruptcy notice in respect of the whole amount, as indicated in the final order, without reducing accordingly those part payments. Vaughan Williams J in no uncertain terms stressed that a bankruptcy notice stating the amount of the original judgment debt, without taking into

consideration the part payments, went against the grain of decided authorities. To include and claim the sums already paid would tantamount to "claiming from him a sum which is not due, inasmuch as it has been paid by him and accepted by the judgment creditor in reduction of the judgment debt ...". Collins J construed the action to include the part payments in the notice as being an inequitable act. I now touch on a local case *ie*, *Re Saloma Co* [1963] 29 MLJ 46, which had the opportunity of discussing the effect of part payments on bankruptcy notices. There the debtor had been served with a bankruptcy notice on 29 May 1962 despite having paid RM700 as part payment on 12 May 1962. His Lordship Azmi J (as His Lordship then was) had no difficulty in declaring the notice defective, and thenceforth setting it aside with costs.

Notwithstanding the fact that the above cases were primarily concerned with bankruptcy notices matters, the same grounds are equally applicable for purposes of analogy, to resolve the problems of defective creditors' petitions. With the promulgation of r. 117 of the Bankruptcy Rules 1969, which provides the conduit to interested debtors desiring to show cause against any petition, creditors would be hard pressed to allege the dearth of provisions available to debtors to channel their grievances.

Under s. 5 of the Bankruptcy Act a creditor shall not be entitled to present a bankruptcy petition against a debtor unless, *inter alia*, a debt of not less than RM10,000 is being owed by the debtor to the petitioning creditor. To protect the estate of the debtor, the court under s. 4 may make a receiving order, but only after the stringent conditions provided under s. 6 had been adhered to. Under the latter section an affidavit containing the facts leading to the filing of the creditor's petition shall be attached and served as prescribed by the Rules. Proof of the debt, a requirement of s. 6 and s. 5, is uppermost in the proceedings before a receiving order is made. In this case as ventilated by both solicitors, two previous part payments had been made toward the partial satisfaction of the debt, but not reflected by a reduced debt in the petition. Due to the strict requirements of the Act, a legal poser will confound the court if the amount in the creditor's petition, as supported by the affidavit does not tally with the evidence before the court.

In the course of my research I stumbled across a few cases, among them, *Re Loh Kok Huah ex p Ban Hin Lee Bank Bhd* [1991] 2 CLJ 1817 and *Re Fong Yuan Kwong, ex p Public Bank Bhd* [1996] 4 MLJ 42, which had decided in favour of the petition. The court in the first case made a bare statement when it said:

> Thirdly, in my opinion, where the judgment debt on which the bankruptcy petition is founded has, by the date of the hearing of the petition, been substantially reduced, this court can still make a receiving order unless the debt was less than the statutory minimum of $2000 since on the true construction of s. 6(2) read with s. 5(1)(a) of the Act it is necessary to prove a debt exceeding the statutory minimum of $2000 is still due and owing to the bank at the date of the hearing of the petition.

Re Fong Yuan Kwong similarly arrived at the same conclusion by merely adverting to the above bare statement without more. After due consideration, and with the highest of respect, I regret to state that I hold a differing view. I must begin by stating that the Bankruptcy Act 1967 is a piece of legislation which must be given a strict construction approach bearing in mind the penal effect of an adjudication order on the debtor. Suffice if I merely focus on one case where Mohamad Azmi SCJ in *Low Mun v. Chung Khiaw Bank Ltd*. [1988] 1 MLJ 263 in succinct terms declared:

> As to the principle of the construing bankruptcy notices, we agree with the view that since bankruptcy is entirely a creation of statute law, the rule of strict construction should be applied to the legislative words creating the bankruptcy.

With those words in mind, the court must give effect to every term or word in the relevant provision. As nothing must be put to waste, no discrimination should occur whereby only certain words are given emphasis whilst the rest ignored. Abdoolcader SCL in *Foo Loke Ying and Anor v. Television Broadcasts Lyd & Ors* [1985] 1 CLJ 511 had occasion to say:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded ...

The issue of discrimination for certain words is mentioned, as the court in *Re Loh Kok Huah*, had given great consideration to the bankruptcy statutory limit, without according sufficient attention to the opening words of s. 5 *ie*, the debt owing by the debtor at the presentation stage, and the debt of the petitioning creditor during the hearing day (s. 6(2)(a)). Without going into legal semantics, indisputably the balance debt of the creditor at the hearing date was RM91,129.48, and not RM91,729.48 as stated in the creditor's petition. As the debt owed by the debtor on the presentation date, or owing to the creditor at the hearing date, was not as per the amount in the petition it was thus open to scrutiny. Approaching it from a different angle, *ie*, in term of figures, as the amount had been reduced by RM600, then invariably too the interest would be reduced proportionately. By merely stating the judgment sum

in a rather mechanical manner, and thus depriving the debtor of his rights to know the exact debt, his rights without doubt had been infringed. Such an infringement was also an infringement of the Bankruptcy Act.

I had to bear in mind also that the above mentioned provisions did not speak of "a debt", which would have included the balance sum, but had instead resorted to the phrase "the debt". In the process of comprehending the latter term, found in both the provisions, I was inundated by the question of why the legislature had insisted on inserting the requirement of the debt and the act of bankruptcy, when the latter occurred by virtue of a debt. Why the duplication? After appreciating the provisions imbued with all the intricacies, the only conclusion that I could arrive at was that the terminology of "the debt" must relate to the sum indicated in the petition, and no more. It could not have meant to include the adjusted sum for the following reason. After an act of bankruptcy has occurred, but before the presentation of the petition, a debtor will be devoid of any personal assets to pay the debt in the bankruptcy notice. This is so as prior to that act of bankruptcy, he was the beneficial owner of his estate and assets then possessed, but now holding a title that is no longer absolute. It will now depend on the failure of any bankruptcy petition being filed within six months of the new status of the debtor, leading to the receiving order being made. If the latter is pronounced then all his assets will vest on the trustee all the way back to the date of the bankruptcy act. Therefore unless this state of suspense is removed, either by that receiving order or lapse of time, he thus has no rights to deal with the assets. He thus cannot transfer a good title. Founded on this predicament, I am hard pressed to arrive at an answer as to how a debtor who has committed an act of bankruptcy, but before a receiving order is made, and without any assets to his name could successfully make part payments. The only possible answer that I could arrive at is that those payments must have come from a third party, or the debtor by some ingenuity, had succeeded in obtaining some funds somehow and somewhere. Regardless of the source, that partial payment had been accepted gleefully by the creditor. At this stage, unless the debt is paid in full, the creditor may reject that part payment and await the receiving order. But as said earlier, regardless of the source of the payment, so long as payments are accepted after the act of bankruptcy has occurred, the creditor runs the risk of having his petition declared defective.

As regards this case, as far as I was concerned too, as the debt in the petition was the only one for consideration, I was thus bound by that perimeter. By analogy to a civil action, in as much as parties are bound by their pleadings, a bankruptcy judge likewise will be bound by the four corners of the petition. Whether the sum inserted in the petition should have been the balance sum

or not was no concern of mine (and improbable as said earlier). I only had to decide whether the creditor had proved the debt stated in it. As it was, I was unable to conclude that the creditor had satisfied me of the stated debt, when on its own, had rejected the amount from the very start. In a round about way, the creditor was hard pressed to admit being owed of the stated sum in the petition, be it during the presentation day or the hearing day (a statutory requirement). The effect was that, by so accepting the part payments, the creditor had disentitled itself of presenting the petition, let alone entitled to apply for a receiving order on the hearing day based on the sum stated in the petition. Whether I call the debt as being non-existent in the technical sense, or incorrect, the bottom-line was that the creditor had failed to establish the debt in the petition on those statutory dates. The defects were certainly not formal but substantive and beyond the help of s. 131 of the Bankruptcy Act. To wrap up this point Sir R. Evershed, MR in *In re Debtors (No. 20 of 1953) Ex Parte The Debtor v. Scott & Anor* [1954] 3 All ER 74 at p. 78 had occasion to remark:

> The Statute itself makes it quite plain that the petitioning creditor's debt, *i.e.* the *debt on which the petition expresses itself* as founded, must be proved to *be existing* when the petition *was presented*, and at the *date of the hearing* (emphasis mine).

Pertaining to the reality of the business world, it is not unheard off of payments being offered after the act of bankruptcy has occurred, and creditors due to the exigencies of the moment accepting them without appreciating the legal effect on the petition. In *OCBC Bank (M) Bhd v. Sethu Ambalagara Thevar* [1998] 3 CLJ 563 the court had occasion to say:

> We are of the view that after the bankruptcy notice had been served on the judgment debtor no negotiation whatsoever should take place anymore ... Once the bankruptcy notice is served, either the judgment debtor pays the amount in the notice in full or face the consequences of being made a bankrupt.

Apart from the above reasons, had I not allowed the appeal, not only would the creditor be ingratiated by the receiving order but also enriched by that RM600 obtained pursuant to the JDS action. Such an enrichment or acquisition will certainly be inequitable in the circumstances of the case. With the creditor being unsuccessful at this stage the petition must be dismissed forthwith (*In Re Gentry* [1910] 1 KB 825). If I may make an observation, even if a creditor were to successfully establish a debt, the receiving order is not to be pronounced immediately. This stage will see the court considering other objections, grouped under the umbrella of "for other sufficient cause", provided

under s. 6(3) of the Act (*Williams on Bankruptcy*, 18 edn, p. 67). The objections could come in many form, *inter alia*, that inequitable enrichment, the creditor throwing himself to the mercies of the subordinate court, the debtor being solvent etc (*Re MS Ward* [1933] MLJ 69). Having considered all those factors the next stage will witness the adjudication stage. The power to adjudicate a person bankrupt is a discretionary power, to be applied only after that receiving order has been made. In the circumstances of the case, the invocation of the court's discretionary power therefore was unjustified, as the receiving order hurdle was yet to be overcome (*In re A Bankruptcy Notice* [1934] 1 Ch 431).

On the above grounds, with such flagrant disregard of the Bankruptcy Act committed by the respondent, I had no recourse but to allow the appeal with costs. The R&A orders were set aside.